

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Whitson v. Whitson*,  
2023 BCSC 1711

Date: 20230929  
Docket: S171474  
Registry: Victoria

Between:

**Justin Dwight Hector Whitson**

Plaintiff

And:

**Claire-Laura Whitson by Her Litigation Guardian J. Scott Stanley, and The  
Public Guardian and Trustee of British Columbia**

Defendants

And:

**Dwight Whitson**

Third Party

Before: The Honourable Mr. Justice A. Saunders

## **Reasons for Judgment**

Counsel for the Plaintiff:

J. Horton

Counsel for the Defendant: Claire-Laura  
Whitson:

G. Battista, K.C.  
I. Kordic

Counsel for the Defendant: The Public  
Guardian and Trustee of British Columbia:

R. McLarty  
R. Powell

Third Party Dwight Whitson:

Appearing on his own behalf

Place and Date of Trial:

Victoria, B.C.  
February 6-10, 13-16;  
March 2-3, 2023

Place and Date of Judgment:

Victoria, B.C.  
September 29, 2023

## **Introduction**

[1] The plaintiff, Justin Whitson, who is now 33 years of age, suffered very significant injuries at birth. His parents, on his and their own behalf, sued the attending doctors and the hospital for malpractice and in August 1996, when Justin was seven years old, negotiated a settlement (the “Settlement”), which was approved by way of an order pronounced by Mr. Justice Melvin on August 30, 1996 (the “Melvin Order”). The plaintiff’s share of the Settlement was structured, with monthly annuity payments up until age 30, and lump sum payments at ages 19, 25, and 30 (the “Annuity”), all payable to the plaintiff’s mother—the defendant Claire-Laura Whitson—as trustee, for so long as he remained in her care. As described below, the Melvin Order was varied by way of an order dated December 15, 2005, pronounced by Mr. Justice Macaulay (the “Macaulay Order”), to provide that on the plaintiff turning 19, the Annuity funds were to be paid to him or, if he was not able to manage his own affairs, to his Committee.

[2] Through a highly unfortunate set of circumstances, when the plaintiff turned 19 the Annuity payments were not directed to him, but continued to be paid to his mother, whom he lived with. His mother has never given a proper accounting of those funds. The plaintiff alleges that his monies were appropriated by his mother almost entirely to her own use and benefit. He says that he did not become aware of his entitlement to settlement funds until April 2015 when he had a discussion with his father, the third party, Dwight Whitson, from whom he had been estranged for many years. It was only at that point in time that he was able, with his father’s assistance, to arrange to receive the Annuity payments directly.

[3] The plaintiff seeks damages for the loss of his Annuity benefits from the date of reaching his majority on July 31, 2008, up to and including May 15, 2015, referred to herein as the “Post Minority Funds”. He claims against his mother in breach of trust and breach of fiduciary duty. As against the defendant, the Public Guardian and Trustee (the “PGT”), the plaintiff pleads that the PGT owed him a duty of care to take reasonable care in the circumstances to ensure that the Post Minority funds were used for his benefit and for his benefit only once he reached the age of majority.

[4] The PGT claims contribution and indemnity against Dwight Whitson.

**The Parties**

[5] Meaning no disrespect, but only to avoid confusion, I will refer to the plaintiff, his mother and his father by their first names: Justin, Claire, and Dwight, respectively. Justin has two older biological sisters, one of whom, Natalie, also plays a role in the following narrative. Justin also has two older half-sisters.

[6] Justin is a remarkable individual. As a result of his birth injuries, he was developmentally delayed and through his life he has suffered from a number of physical and cognitive challenges. His prognosis at birth was dire, and his childhood and adolescent years were difficult on a number of levels. He has been able to summon the will to surmount his many challenges; he was able to obtain his Dogwood Diploma at the age of 23, and went on to enroll in post-secondary studies.

[7] Claire is now incapacitated due to illness. On September 11, 2018, the PGT was appointed Committee of her estate and statutory property guardian. She suffers from severe dementia. Due to the PGT also being a defendant in the present action, the PGT arranged for the appointment of independent counsel to act as Claire's litigation guardian.

[8] The PGT is an individual appointed by the Lieutenant Governor in Council to under the *Public Guardian and Trustee Act*, RSBC 1996 c. 383 [*PGTA*] to exercise prescribed statutory powers, duties and functions, and it has the status of a corporation sole. Those powers, duties and functions are in many respects carried out by deputies, appointed under the *PGTA*. The office of the PGT has other employees, including legal staff. Herein, references to the PGT, except where expressly stated otherwise, refer generally to the Public Guardian and Trustee, its deputies and its employees.

[9] Dwight Whitson was a practicing lawyer for many years, up until leaving practice in the year 2000. He acted as Justin's litigation guardian in the malpractice claim, and instructed counsel in the negotiation of the Settlement.

[10] McKellar Structured Settlements Inc. (“McKellar”) was also initially named as a defendant. McKellar acted for the Whitsons as a broker in purchasing the structured settlement instalment policy (the “Policy”) in 1996. The Policy provided for payments to be made irrevocably to the payee, on a specified schedule, by the Annuity holder Canada Life Casualty Insurance Company (“Canada Life”), which is not and has not been a party to this proceeding. I refer to McKellar and Canada Life herein as the “Annuity Payors”. The plaintiff settled with McKellar prior to trial, and as a term of that settlement, agreed not to pursue the PGT for damages proportionate to McKellar’s share of liability, if any.

### **Background**

[11] From the outset, when the Settlement was concluded in 1996 and payments began under the Policy, Justin did not directly, personally benefit from the Annuity. His parents made no arrangements for Annuity payments, or any portion thereof, to be held in trust and saved. Nor did they ensure that the payments were used for his exclusive benefit. Instead, the Annuity was simply treated as a family asset and the payments served as family income.

[12] Claire and Dwight separated in 1998; they did attempt a reconciliation in 1999, but, as Dwight testified, it did not take. Justin remained in the care of Claire. Dwight moved back into the family home temporarily in or about 2000 to care for Claire and the children, as Claire was suffering from leukemia. By that point in time, Dwight’s legal practice had dwindled, and for some time—his evidence was vague, but it appears for more than a year—he served as a full-time caregiver for the children and assisted Claire in her treatment and recovery. Once Claire recovered, he again moved out. There were periods of time when one or both their daughters lived with him, but Justin stayed with Claire. Throughout those years, when Justin was a minor, the pattern of Justin’s Annuity being used as family income continued, to the extent that—as Dwight acknowledges—the Annuity payments were treated by Dwight and Claire as a component of Claire’s income, for the purposes of determining Dwight’s support obligations.

[13] The Annuity began making monthly payments on October 15, 1996, in the amount of \$2,500. The payments were indexed at 4.0% annually. When Justin turned 19 in July 2008, the monthly payment amount was \$3,848.64. Up to the date of his 19th birthday, the Annuity paid out a total of \$443,076.98. No portion of those “Pre Minority Funds” are claimed in this action; the claims being advanced by Justin are limited to the Post Minority Funds.

[14] Justin turned 19 on July 31, 2008.

[15] Following Justin’s 19th birthday, the monthly Annuity payments continued in the amount of \$3,848.44 for another two months, until the annual index adjustment date. On October 15, 2008 the Annuity paid a lump sum of \$75,000, and the monthly payments then reset to \$3,500.00, indexed at 4.0%. A further lump sum in the amount of \$75,000 was paid on October 15, 2014, when Justin was 25 years old. At that time he was still living with Claire.

[16] Neither Claire nor Dwight told Justin about the lump sum payment scheduled for October 15, 2008, nor about the further lump sum to be paid in October 2014. Nor did they tell him that as of his 19th birthday he personally was entitled to receive the Annuity funds.

[17] Justin continued to live with Claire after he turned 19. With a few exceptions, as described below, Claire continued to receive the Annuity funds, using them for living expenses and for her own purposes.

[18] Justin’s evidence as to the extent of his knowledge of the Annuity during the years he lived with Claire was fragmentary and, in some respects, contradictory. I find that he did in fact gain some awareness over the years that the family, and latterly his mother, were receiving money on account of a lawsuit to do with his injuries. I also find, however, that he did not have a full awareness of the value of the Annuity nor of his entitlement to the Annuity payments until April 2015 when, after a long period of estrangement, he resumed regular contact with Dwight. It was at that time that Dwight first learned Justin had not received any of the Annuity payments

after he turned 19. They contacted McKellar and arranged for payments to be made to Justin directly; this began in June 2015.

[19] Up until that point in time, from Justin's 19th birthday to and including the payment on May 15, 2015, the Annuity had paid Claire \$471,700. Claire has never provided a proper accounting of these Post Minority Funds.

[20] From June 2015 up until the Annuity fund was exhausted in October 2019, Justin personally received periodic and lump sum Annuity payments totalling \$423,035.20.

### **Liability of the Public Guardian and Trustee**

[21] The PGT was not at any time guardian of Justin, either under statute or by way of court order. The plaintiff grounds his case against the PGT in part on the basis of the PGT's statutory authority under the *PGTA* to conduct investigations. Section 17(1) provides:

17(1) The Public Guardian and Trustee may investigate and audit the affairs, dealings and accounts of

(a) a trust, a beneficiary of which is or may be

(i) a young person,

(ii) an adult who has a guardian, or

(iii) an adult who does not have a guardian but who is apparently abused or neglected, as defined in the *Adult Guardianship Act*,

(b) an adult who does not have a guardian, a representative or an attorney under an enduring power of attorney but who is apparently abused or neglected, as defined in the *Adult Guardianship Act*...

[22] The plaintiff says there were two discrete points in time at which the PGT's knowledge of Justin's circumstances created sufficient proximity to found a duty of care, such that the PGT became obliged to exercise its investigatory powers. The first point in time was in 2005, when the PGT took steps to modify the terms of the Melvin Order under which the Settlement was approved, by having Claire removed as Justin's trustee. It was these steps that resulted in the Macaulay Order. The second point in time was in 2006 when, through communications with Dwight and

with one of Justin's sisters, the PGT was informed of Claire's ongoing abuse of Justin.

[23] The plaintiff further says that the PGT owed Justin a duty of care when he turned 19, such that the PGT ought to have ensured that Justin was receiving the Post Minority Funds, or was aware of his right to receive them.

***Circumstances Leading to the Macaulay Order***

[24] The Melvin Order, which had approved the Settlement, provided for Annuity payments to be made to Claire in trust for the benefit of Justin, so long as he remained in her care; empowered Claire to encroach on the capital and income for the maintenance, education, and benefit of Justin; and required Claire to account to the PGT every two years, subject to further court order.

[25] Claire's first account ought to have been submitted to the PGT in the fall of 1998. Claire did not prepare or provide an account. The PGT was dilatory in following up on Claire's accounting obligation. Four years passed from the date her first accounting was due before a solicitor with the PGT's Child and Youth Services division, Mr. Nielsen, wrote to Claire in the fall of 2002. Mr. Nielsen asked Claire to submit accounts for the period August 30, 1996 to August 30, 2002, and regularly going forward, along with confirmations that Justin was still in her care. Mr. Nielsen's letter enclosed a sample statement of accounts and cash transaction journal. He encouraged Claire to begin considering whether Justin, who was then 13 years old, would be competent to handle his legal and financial affairs once he attained his majority, or whether a Committee would be required.

[26] Claire did not respond to that letter, nor to a follow-up letter sent in February 2003, until she telephoned Mr. Nielsen on April 8, 2003. She advised that she was passing on his request for accounts to Dwight.

[27] Mr. Nielsen wrote to Dwight on April 9 and again on May 7, 2003. Dwight responded with a telephone call on June 9, 2003. As he had done during his phone call with Claire, Mr. Nielsen made detailed notes of this conversation with Dwight

and future conversations with him concerning Justin's Annuity. Neither Mr. Nielsen nor Dwight have any independent recollection of these conversations. I accept Mr. Nielsen's notes and memoranda of those communications as an accurate record of what was discussed.

[28] It was in the course of that June 9, 2003 conversation with Mr. Nielsen that Dwight first disclosed that the Annuity payments had been and were being used to support the family: in his words, as recorded by Mr. Nielsen, "to keep the family off welfare and the kids out of foster care". Dwight agreed to send accounts. He did not do so.

[29] In September 2004, the PGT retained outside counsel, Ms. Hunter, to take steps to have Claire as trustee provide a proper accounting. Mr. Nielsen provided Ms. Hunter with a copy of the PGT's August 1996 Comments on the Settlement (the "Settlement Comments"), as described further below.

[30] Ms. Hunter sent Claire a formal demand letter dated October 26, 2004, and a PGT review officer sent Claire a detailed demand for information dated December 8, 2004. Claire responded in late December 2004 with a seven-page handwritten letter and a handwritten itemization of expenses; this information was not responsive to the PGT's request and was not a sufficient accounting.

[31] On April 22, 2005, Ms. Hunter filed a notice of motion, supported by an affidavit of Mr. Nielsen, seeking a Registrar's hearing to pass the accounts of Claire as trustee of Justin's estate. Dwight responded with a phone call to Mr. Nielsen on April 25, 2005, in which expressed a desire to find ways of resolving the situation short of a "battle" in court. He suggested Mr. Nielsen might want to meet with Claire over a cup of tea. Mr. Nielsen emphasized that the PGT needed "real info on where the money has gone". Dwight reiterated how the money had gone to support Justin and the family, which was all for Justin's benefit. Claire responded to the notice of motion with another, lengthier handwritten letter and list of her monthly expenses.

[32] The PGT proceeded with their application, and on May 5, 2005 Master McCallum ordered a Registrar's hearing.

[33] In advance of the Registrar's hearing, Dwight faxed to Mr. Nielsen a report of a neuropsychological evaluation of Justin undertaken by a psychologist, Dr. Joschko, in February 1996, when Justin was six years old. Dwight then followed up with a phone call to Mr. Nielsen lasting approximately one hour on September 13, 2005.

[34] The report of Dr. Joschko had been summarized in the Settlement Comments. To put Dwight's conversation with Mr. Nielsen in context, I digress to refer to it and other summaries of medical information set out in the Settlement Comments, as they set out information previously within the knowledge of the PGT as to Justin's cognitive abilities.

[35] The Settlement Comments refer to expert opinion evidence of four witnesses for the Whitsons as plaintiffs. Dr. Joschko identified Justin's strengths as lying in the areas of vocabulary, verbal expression, verbal memory of meaningful and contextual information, and abstract reasoning. His weaknesses included visual-spatial synthesis, visual-motor integration, visual memory, tactile perception, and a limited ability to sustain and focus attention. Justin's IQ was measured at 81. Difficulties with abstract reasoning could be expected to impair his academic performance in high school. It was Dr. Joschko's opinion that Justin should be able to graduate from high school with a modified learning program, to marry and have children, and "live independently and manage his day-to-day affairs, i.e., routine banking, payment of bills, purchase of groceries".

[36] The Settlement Comments summarize the opinions of three other experts for the plaintiffs—Dr. Strangeland, a psychologist; Dr. Smith, a psychiatrist; and Dr. Tibbles, a paediatric neurologist. The former two noted issues with anger management and impulsivity. Dr. Smith felt it unlikely that Justin would finish high school. Both he and Dr. Tibbles noted issues with Justin's memory and attention

deficits. All three of them diagnosed or identified a risk of Justin developing Intermittent Explosive Disorder.

[37] Similar opinions expressed by the defence expert witnesses are also summarized in the Settlement Comments.

[38] The information Dwight provided to Mr. Nielsen in their September 13, 2005 phone call as to Justin's cognitive status contrasted somewhat with those earlier, pessimistic opinions. Dwight said that Justin was doing extremely well. He reported that Justin was active in army cadets, and hoped to become a chief officer before aging out at age 19. Justin was also competing in swimming as a disabled athlete, and Dwight reported that Justin's coaches were keen on his future. As to schooling, Justin was enrolled in online learning at the high school level, and was working with a home tutor; Dwight was "cautiously optimistic" that Justin would achieve Grade 12 equivalency. He made no mention of the anger management and impulsivity issues that had been of such concern at the time of the Settlement.

[39] Dwight also commented on Claire's status. Her cancer treatments were continuing, and she was having problems with her long-term memory. Dwight described her as a tenacious and determined individual, devoted to the care of her children, and a "tower of strength". Dwight urged Mr. Nielsen that the PGT needed to think "outside the box" in considering Claire's accounts. Mr. Nielsen said the PGT had no intention of contesting the Whitsons' position that Justin had received superior care through staying with his mother, but he stressed that the PGT needed to follow proper procedures due to its potential liability to Justin. Dwight expressed the view that the Registrar's hearing was likely a foregone conclusion, and thought the matter should go straight to a judge for consideration.

[40] The Registrar's hearing took place on September 14, 2005 before District Registrar Bouck. Dwight attended on Claire's behalf, and provided the Registrar with a one-page letter from Claire, in which she acknowledged her record keeping was deficient, and said she was willing to be fully accountable in court.

[41] Registrar Bouck filed a formal Report and Recommendations. The Report notes Dwight having made representations at the hearing, in which he admitted that he had benefited from the annuity while caring for the children during Claire’s leukemia treatments, as he had been unable to practice law and “was essentially a full-time caregiver”. Dwight represented that Justin was an active teenager, participating in cadets, competitive swimming, and martial arts. Justin, he said, was taking Grade 10 and 11 courses through distance learning, and to the best of Dwight’s knowledge expenses related to that schooling were being paid out of the Annuity.

[42] Registrar Bouck found that she was unable to pass the accounts, and stated that on the limited information available, it appeared the Annuity was being used for the benefit of not only Justin but other members of the family. She found that this situation was unlikely to change given the family’s circumstances.

[43] On November 23, 2005, Ms. Hunter filed a notice of motion on behalf of the PGT seeking orders that the Melvin Order be varied and the PGT be appointed as trustee of the Annuity payments in place of Claire, or alternatively, the PGT’s obligation to review the trustee’s accounts be removed. Ms. Hunter also sought to vary the Melvin Order to provide that the Annuity payments be paid to the trustee until Justin reached the age of 19, and thereafter to Justin, or to his Committee if he was not able to manage his own affairs. The application was supported by an affidavit of Mr. Nielsen, in which Mr. Nielsen expressed the PGT’s position that the use of the Annuity for the ongoing support of members of Justin’s family was not a proper use within the discretion of Claire as trustee, and that the PGT was prepared to act as trustee in place of Claire.

[44] There is no record of Claire or Dwight filing a formal application response.

***The Hearing Before Justice Macaulay***

[45] The hearing of the PGT’s application took place before Mr. Justice Macaulay on December 8, 2005, and his decision was pronounced orally on December 15. Claire had retained counsel, Mr. Velletta, and was represented at the hearing by

Mr. Velletta's then articulated student Mr. Waller. Ms. Hunter attended both the hearing and the pronouncement of the oral reasons for the PGT. There are no log notes and no transcripts of the proceedings at the hearing nor of the oral reasons for judgment. Ms. Hunter did however take contemporaneous notes. Mr. Waller did not take notes, and does not remember the substance of the parties' submissions or the judge's comments, but he does recall Justin and Claire being at the hearing. He also recalls Macaulay J. asking Justin at one point what his position was, and Macaulay J. and Justin interacting. Justin testified to having no recollection of the hearing.

[46] On the basis of Ms. Hunter's notes, and Mr. Waller's recollection, I find that during the hearing,

- a) Macaulay J. expressed concern that removing Claire as trustee would impact the family's finances;
- b) Macaulay J. observed that he was being asked to place a heavy burden on Justin, and said words to the effect that on turning 19, Justin would have to decide whether to continue to support his mother;
- c) In answer to questions from Macaulay J., Justin made a brief submission, stating that he agreed with his mother continuing as trustee, and was opposed to the PGT taking over.

[47] In his December 15, 2005 oral reasons for judgment, Ms. Hunter's notes indicate that Macaulay J. said he had been impressed with Justin's submission. Justin, he said, was an intelligent, mature young man who was able to make his own decisions. Macaulay J. found that Justin had thrived in Claire's care. It appears Macaulay J. considered that if the PGT were to be appointed trustee in place of Claire, more of the funds might be devoted solely to Justin's specific needs, but Justin's home would be a poorer one, which might place him at risk. Ms. Hunter's notes indicate Justice Macaulay referred to the situation as similar to that in "*McRae*", i.e. *McRae v. Colwell*, 2004 BCSC 1622 (*sub nom Public Trustee and Guardian v. Colwell*) (discussed below). He concluded that he was not persuaded

there should be a change in trustee. He ordered that the Melvin Order be varied (1) to remove the obligation of the PGT to review the trustee's account; and (2) to provide that the Annuity payments be made to the trustee until Justin turned 19, and thereafter to Justin or his Committee, if he was not able to manage his own affairs.

[48] Giving effect to the Macauley Order's provision that the Annuity would be paid directly to Justin upon him becoming 19 would have required notice being given to the Annuity Payors sometime in advance of that date. The Macauley Order, unfortunately, made no provision for the order being served on either McKellar or Canada Life. Ms. Hunter did not do so. Nor did Claire's counsel, Mr. Velletta, although there is no way Ms. Hunter would have known that at the time. No one at that time seems to have regarded notification of the Annuity Payors as an issue.

[49] Ms. Hunter reported Justice Macauley's decision to the PGT. Internal emails between Mr. Nielsen and the Deputy Public Guardian and Trustee, Ms. Romanko, reflect their profound disappointment with the outcome.

### ***Events Post 2005***

[50] The PGT had no further communication with the Whitson family until August 2006.

[51] Justin testified to having suffered years of physical and emotional abuse at the hands of Claire. I describe his evidence on this point below, in discussing the liability of Claire. At this stage of the narrative, the salient point is that from Justin's perspective, this abuse escalated in 2005-2006. It was also around this time that Justin had begun to notice that Claire was often leaving the house at night, and he discovered she was frequenting a casino.

[52] Justin decided to move in with Dwight in June 2006. He stayed with Dwight through that month until leaving to attend cadet camp for the summer.

[53] One of Justin's sisters, Natalie, telephoned Mr. Nielsen on August 16, 2006, and they spoke for approximately an hour. Again, the conversation is documented in

a detailed memorandum prepared by Mr. Nielsen. Natalie accused Claire of abusing Justin emotionally, physically, and financially. She said that Claire had manipulated Justin into supporting her in remaining as trustee. The whole family, Natalie said, had been victimized by Claire's psychological abuse. She described Claire as evil, and said Claire would stop at nothing to retain control over Justin's money, which she was "addicted" to. Claire, she said, was a compulsive spender, and would go through Justin's monthly payment of \$4,000 within a week. Natalie also advised Mr. Nielsen that Justin was expected back in a few days' time. Mr. Nielsen's notes of their conversation state:

I advised Natalie that the Public Guardian and Trustee had already spent a lot of money unsuccessfully attempting to wrest the annuity from Claire-Laura's control. The Court was convinced that she was doing the best for Justin and the support of Justin and Dwight was clearly a factor in that, as was the fact that Claire-Laura clearly presents as a highly sympathetic person. (Natalie says that this is all manipulation, at which Claire-Laura is masterful.)

I advised that the Public Guardian and Trustee may not be in a position to take any further steps in this regard, given the money and energy already spent unsuccessfully on the matter. However, I said that if she wishes to send me written evidence from herself, Dwight and especially Justin, that I would consider it and talk to those in charge of deciding whether to re-open this matter.

[54] (Mr. Nielsen has no present recollection of that conversation. He conceded in cross-examination that he had no basis for his statement that Dwight's support was a factor in Justice Macaulay's decision.)

[55] Mr. Nielsen explained to Natalie that the PGT might decide to simply wait until Justin turned 19, and then advise him of his right to receive the Annuity payments directly.

[56] Natalie said that she would attempt to get something in writing from all three of them—herself, Justin, and Dwight. Mr. Nielsen explained that while sworn affidavits might eventually be needed, they were not required at that point in time. He noted that Dwight was a former lawyer and should be able to put together a presentation of the family's true circumstances.

[57] Mr. Nielsen's notes concluded with the observation that Natalie seemed extremely vitriolic towards Claire, and sympathetic towards Dwight. While Natalie might be telling the truth, he noted, she also might have an agenda, and he recorded that for this reason it would be especially important to have her accusations corroborated by Justin and Dwight. His initial impression, he noted,

...is that the Public Guardian and Trustee should probably stay well clear of this terrible family situation. It is unfortunate that Justin will continue to be financially abused, but that has been going on for years now and the Court has seen fit to condone it. At age 19, Justin will have the chance to break free of his mother's influence and, hopefully with the support of his family, he will do so.

[58] Natalie did not ever provide written confirmation of her accusations.

[59] Justin returned from camp on or about August 19, 2006. Claire met him at the airport, and said that he was going to be living with her again, and their living arrangement resumed.

[60] Dwight phoned Mr. Nielsen on August 31, 2006. He told Mr. Nielsen that he was as concerned as Natalie, if not more so; that Justin had lived with him for three weeks in June 2006; and that Dwight had taken the opportunity to 'debrief' him, revealing issues that Dwight could not and would not ignore. Dwight said that Claire was abusing Justin's funds and using them to support herself, at least in part because she believed Dwight was deliberately underemployed so as to avoid paying support, which he denied. He acknowledged that the family had withheld information from the PGT when the PGT was attempting to get Claire's accounting, but they had been fearful of making things worse. Dwight said that he expected to have an income very shortly. He was intending to negotiate a support arrangement with Claire, and was planning on addressing the trusteeship issue and the abuse of the Annuity. They discussed that payment of the Annuity to Claire was connected with Justin's custodial situation. Dwight said that he was caring for one of his daughters and would be prepared to take Justin into his home as well.

[61] Mr. Nielsen advised that the PGT would probably agree to act as trustee for the Annuity, but would need to be involved in the process so that the correct order

could be obtained. He noted that the PGT had already spent significant amounts attempting to put a proper trusteeship in place and had received no support from the Whitson family in doing so, and the advised that it would be a “tough sell” to get the PGT involved again.

[62] Within a few days of Justin having returned from cadet camp, he and Claire had a confrontation over money—the sum of \$300, that he had earned at camp—that had gone missing from Justin’s wallet. On September 1, 2006, Justin moved back in with Dwight.

[63] Dwight and Justin both intended that Justin would remain in his care until Justin turned 19, i.e., on July 31, 2008.

[64] On September 14, 2006, Dwight filed a notice of motion and affidavit seeking day-to-day care and custody of Justin and variation of previous spousal and child support orders. He stated in his affidavit that he was willing to provide for Justin’s care,

... without any reference to his trust funds presently being received and administered by the Plaintiff (in the amount of approximately \$3,700.61 monthly as of Oct. 15, 2006).

[65] On September 20, 2006, Dwight phoned and left a message for Mr. Nielsen, advising that Justin had decided to live with him. Dwight intended to have Justin go before a judge and explain his wishes, and he offered to provide the PGT a copy of his motion materials. Dwight said he would keep the PGT apprised. Mr. Nielsen returned the message, advising that they did not need to be copied with materials on Justin’s custody because they had no position on it; however, if custody were changed, someone else would then need to become trustee, and the PGT would then have a position.

[66] Dwight next contacted the PGT on November 22, 2006, leaving another message for Mr. Nielsen. He said that Justin would be staying with him until he turned 19. Mr. Nielsen’s note reads,

Claire tries to get him back w/ “endless propaganda” but it isn’t going to happen.

Dwight said that \$20,000 of Justin’s money had gone to Claire since June and she was using it for her own purposes. In five months she had given him only \$1,000 and a couple of phone cards. He said that Claire had “confessed” to Justin that she had a gambling addiction, and had graduated from scratch tickets to casinos. He said that her lawyers were dragging their feet at her instruction.

[67] Mr. Nielsen returned Dwight’s call on November 24, 2006, and Mr. Nielsen’s notes reflect that they must have spoken at some length. Mr. Nielsen suggested, and Dwight agreed, that as father and guardian, Dwight had the right to apply for an order removing Claire as trustee. Dwight told Mr. Nielsen that he had not yet taken a position on the structured settlement payments. Mr. Nielsen said that if Dwight applied to have the PGT appointed, Mr. Nielsen was “99% sure” that the PGT would support him and agree to act as Justin’s trustee. Dwight said that he would draft up materials. Dwight testified that this would have been a reference to drawing up materials to assume custody of Justin, but I reject that interpretation, as Dwight had already prepared and filed a motion and affidavit to that effect. I find, rather, that Dwight was undertaking to take the initiative in having Claire removed as trustee.

[68] That phone call was Dwight’s last communication with the PGT.

[69] Dwight did not move forward with an application to obtain custody of Justin, nor an application to have Claire removed as trustee.

[70] In May 2007, Justin was 17 years old, still enrolled in distance learning at the high school level. He was continuing to live with Dwight. At that time, Justin underwent a psycho-educational assessment by Dr. Edgell, a psychologist, on referral from South Island Distributed Education School, to assist in planning for after his graduation in 2008. Dr. Edgell’s report notes that Justin was then under the care of Dr. Wood and Project Alive, for management of anxiety and depression. She assessed Justin as having overall borderline measured intelligence at the fourth percentile, significantly compromised perceptual reasoning skills, and visual

processing speed and verbal working memory consistent with students described as “slow learners”. Dr. Edgell concluded that Justin would require family and community support to address his needs, including medical consultation to monitor anxiety and depression; education support to complete a modified educational program; and counselling in respect of employment and job training. In his testimony, Dwight described that report as a “wake-up call”.

[71] Justin continued to live with Dwight until the summer of 2007, when he again went to cadet summer camp. On his return in August, Claire again met him at the airport and said that Justin would be resuming living with her. Dwight gave no explanation, in his testimony, for abandoning his efforts to obtain custody of Justin at that point. Justin and Dwight did remain in contact, though not day-to-day; Dwight testified that Claire “ran a lot of interference”.

[72] In April 2008, when Justin was 18 years of age, Dwight learned of the availability of scholarships at a facility called Echo Village. He thought that Justin could go there and learn about market gardening, and he arranged for Claire and Justin to accompany him on a visit. He testified that the visit went well, Justin was offered a scholarship and initially seemed interested. On the drive home however he became morose. He was concerned with this activity conflicting with army cadets. He became agitated and angry. This escalated to the point of a physical confrontation between Justin and Dwight. Dwight was charged with assault, and gave an undertaking to have no further contact with Justin or Claire. He was tried on that charge and acquitted. Dwight and Justin had no contact with each other from April 2008 until November 2014, when they spoke briefly with each other at a family gathering.

[73] From June 2006, when Justin had come to live with him, until and including the date of that altercation in April 2008, Dwight had no discussions with Justin about the monthly Annuity payments, the scheduled lump sum payments, or Justin’s right to receive those payments upon turning 19. Dwight took no steps to contact the Annuity Payors and ensure they were aware of the variation of the Melvin Order, nor

did he take any other steps to ensure that Justin would receive the Annuity payments after turning 19. Dwight's lack of action was in spite of his knowledge and understanding that Claire (1) had used the Annuity funds for her own purposes, (2) was a compulsive spender and a gambler, and (3) had many inadequacies as trustee. Dwight also did nothing after Justin turned 19 to verify Justin was receiving the Annuity payments.

[74] Dwight did not ever advise the PGT that Justin returned to Claire's care in 2007 and was no longer living with him; that Dwight had abandoned his efforts to obtain custody of Justin; that Justin had not been made aware of his right to the Post Minority Funds; or that he and Justin had ceased contact.

[75] Justin turned 19 on July 31, 2008, unaware of his entitlement to the Annuity payments. The payments continued to be made to Claire.

### ***Discussion***

[76] The plaintiff submits that the PGT, knowing in 2005 that Justin's Annuity funds were not being used for his exclusive benefit and that Claire was incapable of accounting for those funds as trustee, and having no knowledge of Justin's intellectual abilities or special needs, ought to have undertaken a thorough investigation of Justin's circumstances, including school records, medical records, and independent assessments, before bringing the matter before the Court. The plaintiff relies substantially on the decision of this Court in *McRae*, submitting that the standard of care owed by the PGT to Justin was benchmarked by how the PGT conducted itself in the circumstances of that case.

[77] Liability in negligence requires the existence of a duty of care. A duty of care has two elements: "reasonable foreseeability of harm, and a sufficiently proximate relationship between the parties such that it would be just and fair having regard to that relationship to impose a duty of care in law on the defendant": *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 27.

[78] The first inquiry is as to proximity. To establish proximity, a plaintiff must point to a previously established category of proximate relationship, or make the case that the defendant is in an analogous category. If neither is the case, then the Court must undertake a full proximity analysis: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 31.

[79] It is well-established that the PGT has a duty of care when acting as a property guardian of a child, or as Committee of an estate. Here, I find that up until the Macaulay Order was pronounced, the PGT's obligation under the Melvin Order to receive accounts from Claire placed it in an analogous position, creating a sufficiently proximate relationship. The PGT would have been required to exercise its discretionary power to investigate of Justin's circumstances, in the time period up until the Macaulay Order was pronounced, if it had a reasonable basis for concluding that an investigation was necessary to reveal abuse or otherwise safeguard Justin's interests.

[80] The issue, in respect of the PGT having a duty of care in that time period, is one of foreseeability.

[81] *McRae*, like the present case, concerned the administration of a structured settlement annuity instituted in 1996 for a child who had sustained birth injuries. The mother in *McRae* had also been designated as trustee. Unlike Justin, that child was not likely to reach high school, had complex care needs, and would require life-long support. In *McRae*, the mother's first accounting of her expenditures had revealed that substantially the entire monthly annuity payment had gone to pay her a caregiver's wage. The PGT took the position that the mother, in appropriating the payments to herself as wages, had deprived the child of professional services the child required, and had made no arrangements to save so that the greatest possible funds that would be available to meet the child's future needs. Given those concerns, in 2001 the PGT petitioned for an order removing the mother as trustee.

[82] The first hearing of the petition was adjourned, with Mr. Justice Oppal (then a judge of this Court) granting other relief sought by the PGT, including production of

the child's school and medical records, an independent assessment of the child's needs, and an accounting. After some difficulties securing the mother's co-operation, such that a further court order was required, an assessment was conducted by an occupational therapist. The accounting ordered by Oppal J. revealed that up to July 2002—about six years after the annuity payments had commenced—the mother had spent a total of just over \$22,000 on medicine, hearing aid repairs, glasses, psychological and occupational therapy, and some teaching assistance, while paying herself almost \$200,000.

[83] The PGT's petition in *McRae* was heard before Madam Justice Allan in 2004. The Court had evidence as to the family's dire financial circumstances, and expert opinion evidence from a number of specialists as to the care the child required. Justice Allan dismissed the petition, ruling that it was in the child's best interest that the mother remain as trustee, and that the use of the funds to support the family was permissible. Justice Allan wrote:

[28] ...It is hard to see how Matthew would benefit if the Trust funds were allocated solely to savings and the purchase of goods and services, with a small monthly caregiver's allowance and respite allowance paid to Mrs. Colwell. Obviously, shelter, food, and clothing are Matthew's most basic requirements and if his parents cannot otherwise maintain him, it must surely be in his best interests to have those requirements provided by the Trust funds. Further, it would obviously create a risk of harm to Matthew to suddenly withdraw those monthly payments that have been used in large part for his home support.

...

[36] In my opinion, the modest financial circumstances of Matthew's family require a generous degree of flexibility in attributing the Trust funds between monies used for his maintenance and specific services.

...

[38] ...Matthew's most basic need, for a safe and stable home, would be at risk... .

[84] Justice Allan found there was ongoing need for a clinical case manager and an occupational therapist. She directed the mother to ensure those services were provided, noting that the PGT would continue to monitor the trust and would have the ability to renew its application to remove the mother as trustee should she fail to

do so. The mother was to have continuing discretion to spend the monthly funds as required to support the child's well-being.

[85] The plaintiff submits that here, the PGT ought to have sought an order that assessments of Justin's needs be undertaken, before proceeding with its application, as it did in *McRae*. The PGT, it is submitted, had no knowledge of Justin's intellectual abilities or his special needs, but did know the Annuity funds were being abused by Claire. Unlike its actions in *McRae*, the PGT did not obtain assessments of Justin's needs and advocate that it be empowered to continue to monitor Claire's use of the funds. Instead, the PGT asked to be removed from its obligation to review Claire's accounts if she was to continue as trustee. The plaintiff submits that the PGT was derelict in its duty to Justin, demonstrating ambivalence at best, and reckless indifference at worst.

[86] I do not find that *McRae* assists the plaintiff. The Court's comments in that case as to the PGT's ongoing monitoring of expenditures of the annuity were in respect of services required by the beneficiary, not the family's living expenses. In the present case, Dr. Edgell's assessment, conducted about 18 months after the hearing before Macaulay J., identified only needs for medical monitoring of Justin's anxiety and depression, and for educational support, all of which he was already receiving; and for counselling specific to his post-secondary employment, which was not a need that existed in 2005. I cannot infer from that report that Justin had special needs in 2005 that were not being met. There was no evidence tendered to that effect. Without a need for such services being identified, as had been the case in *McRae*, there would have been no expenditures on services to address special needs, for the PGT to monitor. Moreover, the cognitive limitations of the beneficiary in *McRae* appear to have been far more severe than those of Justin. The medical reports of Justin's condition referenced in the Settlement Comments do not indicate Justin's cognition was so compromised as to create a particular risk of him being exploited; Dr. Joschko's opinion that Justin would be capable of managing his own finances, and Dwight's representation, in his September 2005 conversation with Mr. Nielsen, that Justin was doing well, were to the contrary.

[87] In respect of the PGT's purported negligence in 2005, the plaintiff invites this Court to characterize the materials at the hearing before Macaulay J. as "sparse" and the PGT's submissions as "inadequate". Justice Macaulay, however, must by implication have been of the view that those materials and submissions—supplemented by statements made to the Court by Justin himself—were adequate to support the order he made. Had Macaulay J. believed otherwise, it was open to him to have ordered further assessments or investigation. In the face of his conclusion, there is no legal basis for finding that the PGT had been negligent in its conduct of the petition. The plaintiff's submissions in the present case in respect of the PGT's conduct of the accounting and trusteeship applications to the Court amount, essentially, to an impermissible collateral attack on the Macaulay Order.

[88] The PGT did have knowledge in 2005 of the Annuity funds being misused. It had identified what it viewed as Claire and Dwight's abuse of the Annuity, and it was on that basis that the PGT had sought to have Claire removed as trustee, notwithstanding that, as shown by *McRae*, the Court might not view the use of the Annuity for family purposes as abuse. The PGT acted appropriately in responding to the abuse that it could reasonably foresee.

[89] Once the Macaulay Order was pronounced, was the PGT under a duty to ensure that the Annuity Payors received notice of the Macaulay Order, so that they would be aware of Justin's right to receive the Annuity payments on turning 19? Had the PGT been acting on a without notice basis, or had Claire been unrepresented, then once the PGT obtained the Order it had sought, it would certainly be arguable that a sufficiently proximate relationship continued to exist until all parties concerned had been made aware of the Macaulay Order's terms. However, Claire, as trustee, was represented by legal counsel, and was not in any way dependent on the PGT. Given the circumstances, I do not find a sufficiently proximate relationship existed to found a continuing duty of care after the Macaulay Order was pronounced. Neither do I find that it was reasonably foreseeable that Justin would suffer harm. It was not reasonably foreseeable that neither Claire nor Dwight would take steps to put the Annuity Payors on notice before Justin turned 19.

[90] For these reasons, I find that the PGT owed Justin no duty of care in 2005.

[91] The plaintiff also relies on the PGT's statutory authority to conduct investigations in case of abuse, in respect of the PGT's reactions to its communications with Natalie and Dwight in 2006. At that point in time, the Court had relieved the PGT of its obligation to receive accounts from Claire. To establish the PGT owed Justin a duty of care, the plaintiff must show that the circumstances of those communications created a sufficiently proximate relationship and raised a reasonable apprehension of foreseeable harm.

[92] In respect of the phone call from Natalie, I find that call on its own did not create a sufficiently proximate relationship. Mr. Nielsen stated in cross-examination that he was not about to ask his boss to reopen the file on the basis of a phone call. In the circumstances, I find that was an entirely reasonable response. The PGT's resources are limited. There was no reasonable prospect of the Macaulay Order being varied without the cooperation of family members and their giving evidence as to Claire's abuse of Justin, beyond the level of her use of the Annuity payments for living expenses. Natalie said she would attempt to provide written statements. The PGT could not reasonably be expected to act before it had such evidence in hand.

[93] Natalie's accusations and Mr. Nielsen's comments to her were, in any event, overtaken within a matter of a few weeks by Dwight's intervention and his representations to Mr. Nielsen that he would pursue legal steps to safeguard Justin's interests.

[94] At the time, Mr. Nielsen understood Dwight to be Justin's guardian. In fact, that appears not to have been the case; Claire had been appointed interim sole guardian of Justin's estate under an order made August 3, 1999 in the divorce proceedings. There is no evidence, however, that the PGT was ever aware of that order. Claire's December 2004 letter to the PGT described herself as having had day-to-day care and full custody of Justin, but did not refer to guardianship. In her September 14, 2005 letter to the Registrar, which was delivered to the Registrar by Dwight, Claire had referred to Dwight as Justin's "joint guardian and biological

father”. During their final conversation on November 24, 2006, Dwight and Mr. Nielsen had discussed Dwight’s right as legal guardian to apply to remove Claire as trustee. Given the understanding that Justin’s interests were being safeguarded by his father, and that his father was in a position to do so, the circumstances did not create sufficient proximity between Justin and the PGT, to create a duty of care: neither in respect of the PGT exercising its power to investigate, nor in respect of any obligation on the part of the PGT to ensure Justin was aware of his rights on turning 19, or to ensure that he was receiving the Annuity.

[95] Not only was there insufficient proximity to found a duty of care, but it was not reasonably foreseeable that Justin would suffer a loss of his Post Minority Funds. Justin, to the knowledge of the PGT, was living with Dwight, and would do so until he turned 19. It was not reasonably foreseeable that Dwight and Justin’s relationship would be severed for years, and that Dwight would do nothing to advise Justin of his right to the Annuity.

[96] Mr. Nielsen’s notes record him having said to Natalie that the PGT might wait until Justin turned 19 and then advise him of his rights to the Annuity. In cross-examination, Mr. Nielsen acknowledged that he may have said that at the end of a long conversation, but said he was incorrect; in his view the PGT had no authority to take such a step. There is no evidence that Natalie or anyone else, least of all Justin, relied on that statement made by Mr. Nielsen. Regardless of Mr. Nielsen’s views at the time as to what the PGT might do, I find the PGT owed no duty of care and was under no obligation to advise Justin of the Annuity.

[97] The plaintiff submits that Mr. Nielsen’s notes of his conversations with Natalie and Dwight in 2006 reflect a callous disregard for Justin’s rights, and the PGT giving priority to avoiding liability and expense. That is not sufficient to create a duty of care, but in any event, I do not accept that characterization of the PGT’s position. Mr. Nielsen’s comment in his memorandum of the phone call with Natalie that the PGT “should probably stay well clear of this terrible family situation” was an initial impression, not a statement of policy. Mr. Nielsen’s later notes of his

communications with Dwight clearly indicate him expressing support for Dwight's proposed plan of action.

[98] The claim against the PGT is dismissed.

### **Liability of Claire Whitson**

[99] After turning 19, Justin continued to live with Claire, until April 2015, when he was 25 years old. Claire maintained control over Justin's finances throughout that time period. I accept Justin's evidence that she inflicted on him terrible emotional and verbal abuse, and physical abuse as well. She belittled, threatened, and manipulated him. She took out on Justin the anger that she felt towards Dwight. Justin found his home life chaotic, and unbearable, and used activities such as army cadets as a means of escape. He attempted suicide at the age of 14. He had further thoughts of suicide in early 2015 when he was 25 years old.

[100] Justin began earning money at the age of seven, with a paper route. Claire would routinely take money from his wallet. That continued into his teen years, when he had odd jobs, and then steady part-time employment. Her theft of the \$300 from Justin's wallet, that precipitated Justin moving in with Dwight in 2006, was part of a long pattern of financial abuse. A further example cited by Justin was that when he was in his early 20s he went to Camosun College and received student grants of about \$2,500 or \$3,500 per term. He used those monies to pay his fees and deposited the rest in a bank account that Claire helped him open when he was in his teens. Eventually, that money went missing from the account.

[101] On October 15, 2008—two-and-a-half months after Justin's 19th birthday—the Annuity made a lump sum payment of \$75,000. Justin testified that on November 15 of that year, Claire presented him with a money order for \$40,000, explaining that it was money for his lawsuit. He testified that he was perplexed, and then though that the funds would provide him with the means to escape. He deposited the money into a bank account, and moved out, renting an apartment in Surrey. He lived on his own from November 2008 to mid-February 2009.

[102] After some time, Justin discovered that a substantial part of his savings—approximately \$20,000 or \$25,000—was withdrawn from the account without his permission, leaving him with a balance of only approximately \$7,000. He testified that the bank froze the account. The bank told him they would conduct an investigation, but he never received an explanation.

[103] Justin testified that he spoke to his mother about the missing funds. He told her he was shocked. Claire suggested the money might have been taken by a friend who had been staying with Justin, or by Natalie. Justin discounted the possibility of it having been his friend, but testified that he started wondering if it had been Natalie who was responsible.

[104] His funds depleted, Justin returned to living with Claire.

[105] In October 2014, the Annuity paid another \$75,000 lump sum. Claire gave him \$20,000 in a birthday card. She said, “[t]his is money you’re entitled to”. He asked why, and she said, “[f]rom the lawsuit”. He deposited that sum into a Scotiabank account in his name. Justin tendered as evidence a series of bank statements from a Scotiabank account in his name, predating and postdating that \$20,000 deposit. The statements show there were cash withdrawals of \$1,000 or more—six withdrawals, totalling \$10,375—in the six-month period after Claire gave Justin that money. Justin has no recollection of making withdrawals in such amounts, and does not believe they were made by him; there were some smaller cash withdrawals, but for the most part the transactions shown on the statements were point of sale purchases.

[106] Justin testified that in 2015 he came across a bank card in Claire’s wallet that had his name on it. He now surmises that she had access to his bank account. Based on her past history, he surmises it was Claire who made the unauthorized withdrawals.

[107] I find Claire Whitson was in breach of her fiduciary duties as trustee. She misappropriated Justin's trust funds for her own use, and failed to account. She is responsible for the entirety of his Post Minority Funds.

[108] The total value of the Post Minority funds was \$471,700. Claire did give Justin two large sums, following her receipt of the October 2008 and October 2014 Annuity lump sum payments, totalling \$60,000. I am satisfied, on a balance of probabilities, that after Justin deposited those funds in his bank accounts, Claire made unauthorized withdrawals totalling at least \$30,000. Her liability to Justin is in the principal amount of \$441,700.

[109] I have considered whether some adjustment to the quantum of Claire's liability is required to account for the sums that Justin would have spent supporting himself, as living expenses, had Claire not withheld from him the Annuity payments he was due as of his 19th birthday. In a negligence case, where the measure of loss is that required to put the victim in the position they would have been, but for the tortfeasor's conduct, such an adjustment would be required in assessing damages. In breach of trust, however, the remedy is not damages, but restitution: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534. A trustee is strictly liable to account for the actual value of trust property, and any diminution or mitigation of a trustee's liability can only arise through the application of equitable principles. The salient equitable principle in the present case is the doctrine of 'clean hands'. That is the principle that equitable relief may be denied where the breach of trust or breach of fiduciary duty has "an immediate and necessary relation" to the equitable relief sought: *Mayer v. Osborne Contracting Ltd.*, 2010 BCSC 1249 at para. 243, quoting *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167. Given what I find was likely a pattern of theft of both Annuity monies Claire provided to Justin, and Justin's earnings, I do not credit Claire with an adjustment amount in respect of Justin's living expenses.

[110] Justin is entitled to judgment against Claire in the amount of \$441,700, plus prejudgment interest.

[111] The balance of the claims herein are dismissed.

[112] If the parties are unable to agree on what costs awards flow from this decision, they will have leave to make written submissions. In that case, the parties should, within 30 days of these Reasons being released, agree to a schedule for exchanging written submissions and delivering them to the Court, and advise me of that schedule. All communications with the Court and written submissions are to be in .doc or .docx format, delivered to the Court as attachments to email addressed to Supreme Court Scheduling, Victoria.

“A. Saunders J.”